MAY 10 1968

No. 22591

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22591

THOMAS FRED WALLACE and NORMA MAY WALLACE, husband and wife, Appellants,

v.

EMPLOYERS CASUALTY COMPANY, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

OPENING BRIEF FOR APPELLANTS

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STATEMENT OF PLEADINGS AND FACTS

Thomas Fred Wallace and Norma May Wallace, plaintiffs below, appeal from the Judgment of the United States District Court for the District of Arizona entered the 29th day of November, 1967, the Honorable Walter E. Craig presiding, granting the motion for summary judgment filed herein by defendants, and dismissing plaintiffs' complaint [TR 46].

Notice of appeal and cost bond on appeal were filed on December 21, 1967 [TR 47-48] and this Court has jurisdiction by virtue of 28 U.S.C.A. § 1291.

This action is a sequel to a previous action in the Superior Court of the State of Arizona in and for the County of Maricopa wherein the plaintiffs, appellants herein, sued to recover damages as a result of injuries sustained by them in an automobile accident occurring on the 3rd day of August, 1964, and caused

by the negligent operation of a certain 1957 Chevrolet automobile by one Kenneth Russell Lewis. Plaintiffs below instituted this action in the United States District Court to recover the unpaid balance of a judgment rendered in the State Court action on the 25th day of January, 1967, in favor of plaintiffs and against defendants Kenneth Russell Lewis and Joe F. Potts and Bonnie Potts. Defendant's liability is based upon a policy of liability insurance issued by them to one Nelson Olson doing business as Olson Motors, which policy covered the use of the 1957 Chevrolet automobile by Kenneth Russell Lewis as a permissive user under an omnibus clause in the policy as required by A.R.S. § 28-1170(B)2, at the time of the collision. The District Court had jurisdiction by virtue of 28 U.S.C.A. 1332.

Summary judgment was subsequently entered in favor of the defendant. It is plaintiffs' position that the summary judgment entered herein should be reversed and remanded with directions to enter judgment for the plaintiffs because the vendor of a motor vehicle is deemed the owner of the motor vehicle and the vendee is deemed to be operating the vehicle with the permission of the vendor for purposes of the omnibus coverage

in a public liability policy, after the sale of a motor vehicle, but prior to compliance with the formalities of the Arizona Motor Vehicle Code, A.R.S. § 28-314, regarding the transfer of title and reregistration of motor vehicles.

STATEMENT OF THE CASE

Thomas Fred Wallace and Norma May Wallace, appellants in this action, were also plaintiffs in a suit filed with the Superior Court of the State of Arizona, in and for the County of Maricopa, being Cause No. 166356 in the said court. The Wallaces sought to recover damages as a result of an automobile accident occurring on or about August 3, 1964, when a 1957 Chevrolet being driven by one Kenneth Russell Lewis on State Highway 89, Yavapai County, Arizona, collided with an automobile being driven by Thomas Fred Wallace and in which Norma May Wallace was a passenger [TR 16-18]. The 1957 Chevrolet had been taken in by Olson Motors of Williams, Arizona, from a Mr. Jack Dent in trade for a new car. Thereafter, the 1957 Chevrolet was sold by Olson Motors on July 30, 1964, to one Douglas Ezell, manager of the Potts Motor Company of Phoenix, Arizona.

[Deposition of Robert Y. Stokan p. 17; TR 24]. Four days later, on August 3, 1964, the day of the accident, Lewis, who had been hired by Ezell and acting within the course and scope of his employment, picked the subject automobile up at Olson Motors in Williams, and was at the time of the accident transporting the vehicle to the Phoenix place of business of the Potts Motor Company [TR 24].

The purchase of the subject vehicle had been paid for with a sight draft drawn on the account of Ezell, and upon presentation the sight draft was paid in the amount of $650 [TR 25]. However, the certificate of registration and title to the subject 1957 Chevrolet was never actually signed over to either Douglas Ezell or the Potts Motor Company, as required by Arizona Revised Statutes § 28-314(A)*/ [TR 25].

Thomas Fred Wallace and Norma May Wallace, instituted the prior state court action against defendants, Lewis, Potts and Ezell on the 18th day of September, 1964, in the Maricopa County Superior Court. Notice of the pendency of this lawsuit, together with a demand that it be defended by Employers Casualty Company, was

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*/ See Appendix A-1

given to both Olson Motors and Employers Casualty Company on or about March 2, 1966 [TR 39]; however, the suit was not defended by Employers Casualty Company. The matter was subsequently tried before the Maricopa County Superior Court, and plaintiffs in this action obtained a verdict for their damages against Lewis and Potts in the amount of $50,000. Judgment thereon was subsequently entered on the 25th day of January, 1967 [TR 17, 20].

Subsequently, and on or about the 2nd day of March, 1967, the present action was instituted by Thomas Fred Wallace and Norma May Wallace, plaintiffs, against Employers Casualty Company, defendant, in the United States District Court for the District of Arizona. Plaintiffs' complaint alleged that prior to the 3rd day of August, 1964, the defendant, Employers Casualty Company, had issued to Nelson Olson, doing business as Olson Motors, a liability insurance policy, and further alleged that said insurance policy covered the use of the said automobile by Kenneth Russell Lewis on the 3rd day of August, 1964, by virtue of the inclusion therein of an omnibus clause as required by A.R.S. § 28-1170(B)2*/ [TR 16-18]. Defendant's answer

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*/ See Appendix A-2

admits that defendant had issued to Nelson Olson, doing business as Olson Motors, an automobile dealer's liability policy of insurance, but expressly denies that said policy covered the use of the 1957 Chevrolet automobile by Kenneth Russell Lewis under the circumstances [TR 19-22].

Subsequently, both plaintiffs and defendant moved for summary judgment [TR 23, TR 31]. The only question presented was whether the vendor of a motor vehicle is still deemed the owner of the vehicle and the vendee deemed to be operating the vehicle with his permission for purposes of the omnibus coverage in a public liability policy, after the sale of a motor vehicle, but prior to compliance with the formalities of the Arizona Motor Vehicle Code, A.R.S. § 28-314 regarding the transfer of title and reregistration of motor vehicles. The court granted defendant's motion for summary judgment and judgment for the defendant was entered on the 29th day of November, 1967 [TR 46].

SPECIFICATION OF ERROR

The District Court erred in holding as a matter of law that the vendor's motor vehicle liability coverage did not extend to the buyer as a permissive user under the omnibus clause of the vendor's liability insurance policy where the vendor failed to transfer title upon the sale of a motor vehicle in violation of A.R.S. § 28-314.

A R G U M E N T

AUTOMOBILE DEALER'S PUBLIC LIABILITY POLICY CONTINUES IN FORCE COVERING AUTOMOBILE UNTIL SALE OF AUTOMOBILE IS CONSUMMATED BY COMPLIANCE WITH THE REGULATIONS GOVERNING THE TRANSFER OF THE CERTIFICATE OF TITLE

The central issue in this case is whether or not failure to transfer title upon the sale of a motor vehicle, in violation of the applicable statute, in this case A.R.S. § 28-314, operates to extend the vendor's liability coverage to the buyer under the omnibus clause of the vendor's liability policy. The courts have consistently answered this question in the affirmative.

In *U.S. Fidelity & Guaranty Corp. v. Myers Motors,* 143 F. Supp. 96 (D.C. Va. 1956), a vehicle was sold and

delivered to the purchaser; however, the financing was still unsettled and the certificate of title had not yet been endorsed by the sales agency and delivered to the purchaser. The Virginia Motor Vehicle Registration Law (which is similar to the Arizona statute) required that the seller endorse the title on the reverse side and deliver it to the purchaser. A full month after delivery of the vehicle the purchaser was in an accident. The court held that even though the sale of an automobile would have constituted a completed sale but for the Virginia Certificate of Title Law, failure to comply with that law's requirements as to transfer of certificate of title resulted in legal title remaining in seller; and the public liability garage policy insuring the seller against claims arising out of the ownership of any automobile in connection with its automobile dealership, would cover claims arising out of accident of which buyer became involved. The following language of that decision is applicable to the case at bar.

> "Upon the facts found, it is my conclusion that, but for the Certificate of Title law, the transaction between Harris and Myers constituted a completed sale and all ownership of the 1952 Mercury would

have passed from Myers Motors Inc., to Harris. However, under the Virginia Certificate of Title law, before legal title to an automobile can be transferred in Virginia, the owner is required to endorse an Assignment and Warranty of Title upon the reverse side of the Certificate of Title and deliver to the Purchaser at the time of the delivery of the vehicle. Section 46-84. Section 45-85 requires the purchaser to immediately forward the Certificate, so endorsed, to the Division of Motor Vehicles, and it is made a penal offense not to comply with these requirements.

Shortly after its enactment the Certificate of Title law, in its application to a situation substantially similar to the one here, came before the Supreme Court of Appeals in Virginia, for construction in Thomas v. Mullens, 153 Va. 383, 149 S.W. 494, 497. Noting that the Certificate of Title law 'is essentially a police protection of the public, and its provisions are mandatory in their terms', the court held that the Certificate of Title law, not having been complied with, '. . . then the contract of sale was merely executory and not executed' . . . .

It must be conceded that, if the transaction here under consideration was merely an executory contract of sale, then 'ownership' of the 1952 Mercury automobile remained in Myers Motors, Inc., the insured . . . .

To me, the conclusion seems inescapable that the doctrine of Thomas v. Mullens, supra, controls the decision of this case. Undoubtedly, Harris, as the vendee in an executory contract of sale, acquired some rights, but it is my conclusion that, as the certificate of title law was not complied with, the legal title to the automobile in question remained in Myers Motors,

> Inc. That being true, its 'ownership' remained in Myers Motors, Inc., the insured, subject only to such rights as Harris might have as vendee in an executory contract of sale.
>
> It follows that a judgment will be entered declaring that the policy of insurance here in controversy covers any liability which may result from the collision in which Harris was involved. . . ."

The rule in California is to the same effect, and until the formalities required by the California Vehicle Code are met, the vendor of a motor vehicle is still deemed the owner of the vehicle and the vendee is driving with his permission for purposes of the omnibus coverage in a public liability policy, see *Harbor Ins. Co. v. Paulson*, 135 Cal. App. 2d 22, 286 P.2d 870 (1955), a leading case in point. See also, *Traders & General Ins. Co. v. Pacific Employers' Ins. Co.*, 130 Cal. App. 2d 158, 278 P.2d 493 (1955).

> "[B]ut the rule is now well settled that a conditional vendor is considered the owner of a vehicle and the conditional vendee is held to be the operator with permission of the owner where the vendor delivers possession to the vendee and fails to comply with § 177 with reference to giving notice of the transfer prior to the occurrence of the accident."
> (278 P.2d at 496)

Votaw v. Farmers A. Inter-Ins. Exch.,
15 Cal. 2d 24, 97 P.2d 958;

Sly v. American Indemnity Co.,
127 Cal. App. 202, 15 P.2d 522; and

Stoddard v. Maines, 337 P.2d 855 (1959) [where the automobile dealer failed to give notice of an automobile transferred under a conditional sales contract not later than the date of the dealer's next business day, such failure deprived the dealer of exemption from liability, and the dealer was liable for the negligence of the conditional vendee in the operation of the vehicle which had not been previously registered in the conditional vendee's name].

Allstate Ins. Co. v. Hartford Accident & Indemn. Co., 311 S.W.2d 41 (Mo. 1958), involved an action by automobile buyer's liability insurer against the seller's liability insurer to recover an amount paid in satisfaction of a judgment obtained against buyer by third parties. It was held by the Missouri Court that (a) under a liability policy covering the ownership, maintenance, or use of premises for purpose of automobile dealer and operations incidental thereto, and defining "insured" as including persons using the automobile with permission of the dealer as the named insured,

and (b) where the sale of the automobile had been agreed on and the automobile itself delivered, but title had not passed at the time of the accident because the statutory requirements had not yet been complied with, (c) buyer was operating with "permission" of dealer and hence accident was covered by dealer's policy.

In another leading decision, *Eggerding v. Bicknell*, 20 N.J. 106, 118 A.2d 820 (1955), it was squarely held by the New Jersey Court that an automobile dealer which had yet to transfer title to one of its vehicles in accordance with the statutory procedure was still the owner thereof for purposes of insurance coverage under the terms of its policy. [It should be noted that the dealer in *Eggerding* had assigned the certificate of title in blank in the same manner as the dealer in this case.] In holding that a failure to comply with the statute operates to extend insurance coverage to damages done by the buyer, the court went on to note as a matter of public policy that an automobile liability insurance contract is to be liberally construed for protection not only of the named insured but also of innocent persons injured by the negligent operation of an insured automobile along a public highway.

Under a very strong Ohio statute the same results obtain. In *Farm Bureau Mutual Automobile Ins. Co. v. Motorists Mutual Ins. Co.*, 110 Ohio App. 12, 168 N.E.2d 159 (1957), it was held that where the purchaser of automobile collided with another automobile nearly 4 months after the purchase, and after the dealer had assigned title to purchaser but before purchaser signed application for title as required by Ohio law, the automobile dealer was the owner of the automobile within its public liability policy and the automobile was used in connection with dealer's operation within its policy and dealer's insurer was therefore primarily liable on claim against the purchaser.

> "The trial court held, and we are in accord, that the use of the automobile by the purchaser with the dealer's permission until title had passed, in conformity with the Ohio Certificate of Title law, would be a use incident to and in connection with the assured's operation of the business as a dealer."
> (168 N.E.2d 162)

Nationwide Mutual Ins. Co. v. Motorists Mutual Ins. Co., 1160 Ohio App. 22, 186 N.E.2d 208 (1961), involving an action between two insurers for a declaratory judgment as to their liability for any damages that might be recovered in an action pending against a certain individual,

held that liability coverage on an automobile under a garage policy issued to an automobile dealer which sold the automobile and immediately delivered it to purchaser continued, under statute pertaining to transfer of title until a certificate of title on the automobile was issued to the purchaser even though purchaser had made full payment of the agreed price. See also, *Wheeler v. State Farm Mutual Auto Ins. Co.*, 183 N.E.2d 244 (Ohio App. 1962).

Clearly strong considerations of public policy permeate this area. An automobile liability policy is liberally construed for the protection not only of the named insured but of third persons who may be sued by reason of the operation of the vehicle concerned. In *Maryland Casualty Co. v. American Family Ins. Group of Madison, Wisconsin*, 199 Kan. 273, 423 P.2d 931 (1967), it was held under a Kansas statute making it unlawful to sell a registered vehicle without assigning the certificate of title and making any such sale fraudulent and void, that public policy required that the statute making it unlawful to sell registered vehicles without assigning the certificate of title should be liberally enforced for the protection of third persons who suffer injury from the hands of a buyer who obtains possession

and control of the automobile from the seller.

The same policy considerations apply under Arizona law. In *Schecter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136 (1963) [holding Arizona Financial Responsibility Act constitutional]; and *Jenkins v. Mayflower Ins. Exch.*, 93 Ariz. 287, 380 P.2d 145 (1963) [holding the omnibus clause prescribed in Financial Responsibility Act to be a part of every motor vehicle liability policy as a matter of law], the principal purpose of the Arizona Legislature in requiring an omnibus clause as a portion of the State's Financial Responsibility Act was held to be:

> "[T]he protection of the public using the highways from financial hardships which may result from the use of automobiles by financially irresponsible persons . . . . the providing of security against uncompensated damages arising from operation of motor vehicles on our highways."
> *Schecter v. Killingsworth, supra,* 380 P.2d at 140; and
> *Jenkins v. Mayflower Ins. Exch., supra,* 380 P.2d at 147.

See also *Votaw v. Farmers Automobile Inter Ins. Exch., supra, Eggerding v. Bicknell, supra,* and *Harbor Ins. Co. v. Paulson, supra.*

It follows therefore that the citation of cases dealing with the sale of motor vehicles generally but not concerned with public liability coverage offers no persuasive guide or precedent in this case. The cases above cited universally distinguish between the rights of buyer and seller, between themselves as a matter of sales law, and the rights of innocent third persons against the vendor's insurance carrier as a matter of insurance law. Compare generally, *Civil Service Employers Ins. Co. v. Wilson*, 25 Cal. Rptr. 304, with *Harbor v. Paulson, supra.* Likewise, the line of cases so ably distinguished by the court in *Harbor v. Paulson, supra,* is likewise inapplicable to the facts in this case since no failure to comply with the title statutes was presented in those cases.

Clearly the decisions cited above represent the overwhelming weight of modern authority in the fact situation at bar. It follows therefore that the legal result of the vendor's failure to reregister title to the subject vehicle in accordance with the applicable statute upon the sale of the vehicle, is that the buyer must be held to have operated the vehicle with the permission of the vendor. The defendant's liability policy

therefore inured to the benefit of the plaintiffs at the time of the accident between the buyer's agent, Lewis, and the plaintiffs.

C O N C L U S I O N

For the reasons above stated, plaintiffs respectfully submit that the trial court erred as a matter of law in granting summary judgment to the defendant and plaintiffs respectfully request that the judgment of the District Court herein be reversed and remanded with instructions to enter judgment for the plaintiffs.

Respectfully submitted,

GOLDMAN & RIPPS

By /s/ Charles H. Ripps
Charles H. Ripps

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Attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Charles H. Ripps

Charles H. Ripps

AFFIDAVIT OF SERVICE BY MAIL

CHARLES H. RIPPS, being duly sworn, says that he deposited three (3) copies of the foregoing Opening Brief for Appellants in final printed form in the United States post office in the City of Phoenix, State of Arizona, enclosed in an envelope duly addressed to Mr. Ralph Hunsaker, O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, 1800 First Federal Building, Phoenix, Arizona 85012, with postage fully prepaid; he further states that he deposited twenty (20) copies in the United States post office in the City of Phoenix, State of Arizona, duly addressed to the Office of the Clerk, U. S. Court of Appeals for the Ninth Circuit, San Francisco, California 94101.

Both mailings were made on the 8th day of May, 1968.

/s/ Charles H. Ripps

Charles H. Ripps

Subscribed and sworn to before me this 8th day of May, 1968

[SEAL]

/s/ Catherine F. Howard

Notary Public

My commission expires September 29, 1971

A P P E N D I X

ARIZONA REVISED STATUTES

§ 28-314. Transfer of title; reregistration

A. When the owner of a registered vehicle transfers or assigns his title or interest thereto, the registration of the vehicle shall expire, but the number plates assigned to the vehicle shall remain thereon. Upon the transfer or assignment, the owner shall remove the registration card issued for the vehicle and endorse upon the reverse side thereof the name and address of the transferee and the date of transfer, and shall immediately forward the card to the vehicle division. The owner shall also endorse on the back of the certificate of title to the vehicle, if issued, any assignment thereof, with the warranty of title in the form printed thereon, and shall deliver the certificate to the purchaser or transferee at the time of delivery to him of the motor vehicle, except as provided in § 28-323. The purchaser or transferee, except as provided in § 28-315, within ten days after the transfer shall apply for and obtain the registration of the vehicle by presenting the certificate of title thereto to the vehicle division, accompanied by the required fee, whereupon a new certificate of title shall be issued to the purchaser or transferee.

§ 28-1170. "Motor vehicle liability policy" defined

A. . . . .

B. The owner's policy of liability insurance must comply with the following requirements:

1. . . . .

2. It shall insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of the motor vehicle or motor vehicles within the United States or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each motor vehicle . . . .